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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 624

PECHEUR LOZENGE CO., INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

WALTER GORDON MERRITT,
Attorney for Pecheur Lozenge Co., Inc.,
Petitioner.

ALFRED J. L'HEUREUX,
PETER X. McMANUS,
HENRY CLIFTON, JR.,
Of Counsel.

March 5, 1954.

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OCTOBER TERM, 1953

No. .....

PECHEUR LOZENGE CO., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Pecheur Lozenge Co., Inc. (herein called "Company"), prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit entered January 21, 1954 enforcing as modified an order of the National Labor Relations Board dated March 11, 1952 (R. 34-48).

Opinions Below

The decision of the National Labor Relations Board is reported 98 N.L.R.B. 496 and the decision of the Court of Appeals is reported ..... F. 2d .....

Jurisdiction

The jurisdiction of this court is invoked under Title 28 United States Code, Sections 1254 and 2101.

Questions Presented

1. Whether under the "Labor Management Relations Act, 1947" and pertinent decisions of the N.L.R.B., an employer was under legal obligation on December 7, 1949 to bargain with a charging union which was not in compliance under Section 9 of said statute.

2. May an employer be found guilty of a violation of Section 8(a)(5) of said Act, where the charges and complaint do not give notice of an intention to prosecute for such a violation.

3. Whether the prosecution of this proceeding for an alleged refusal to bargain in December 1949 is barred for failure to file and serve the required charge within six months of said alleged refusal; it appearing that the only charges filed within the six months period alleged solely discriminatory discharges and refusals to re-employ, all in the month of December 1949, and that no charge was ever filed at any time alleging a refusal to bargain in December 1949 under Section 8(a)(5), and that the only charge of refusal to bargain was filed by the charging union on September 28, 1950 (nearly six months after it came into compliance and nine months after December 1949) alleging only a refusal to bargain based on conduct *in April 1950*—not December 1949.

Statement of Facts

The statement of facts and law are more fully set forth in the annexed brief.

Reasons in Support of Application for Writ

1. There is a conflict in respect to the points herein raised between the decision of the Court of Appeals herein and the decision of the Court of Appeals for the Fourth Circuit in the case of *Joanna Cotton Mills Co.* v. *N.L.R.B.*,

176 F. 2d 749. (See *N.L.R.B.* v. *Martin*, 207 F. 2d 655 at 657, 9th Cir. 1953.) As set forth in the Company's annexed brief there is also a group of relevant decisions in the different circuits which vary in their treatment of these legal questions.

2. The questions presented involve important interpretations of Federal law, which in the interest of the administration of the National Labor Relations Act, should be settled authoritatively by this court.

3. The Court of Appeals in the instant case erroneously interpreted *N.L.R.B.* v. *Dant*, 344 U. S. 375.

4. The Court of Appeals decision in the instant case, so far departed from accepted standards of due process and administrative law as to call for a decision by this court in order to end confusion and minimize litigation in the future.

Conclusion

For the reasons stated in this Petition and the annexed Brief in support thereof, this application for a Writ of Certiorari should be granted.

Respectfully submitted,

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In the

October Term 1953

Supreme Court of the United States

No. .....

Pecheur Lozenge Co., Inc.,

Petitioner,

vs.

National Labor Relations Board,

Respondent.

PETITIONER'S BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

The petitioner (herein called the "Company") seeks a review of a decision of the Court of Appeals for the Second Circuit, enforcing an order of the National Labor Relations Board which held that the Company violated Section 8(a)(5) of the Labor-Management Relations Act, 1947, by a refusal to bargain in December 1949.

Statement of Facts

For the purpose of its petition the Company accepts in general the statement of the concrete facts set forth in the opinion of the Court of Appeals.

About November 14, 1949 the Union ("65" The Wholesale, Retail and Warehouse Workers Union) approached

the Company for recognition stating that, since it was a nonconforming union under Section 9 of the Act, it could not petition for an election. To cooperate with the Union the petitioner consented to an election outside of the purview of the Act. In the election which followed the Union won. On November 16, 1949 the Company signed an agreement recognizing the Union as the sole collective bargaining agent.

On November 29 when the parties met for bargaining, the Company asked for postponement of negotiations until it received its financial statement. This meeting adjourned without results. On the same day trouble arose because of a refusal of the employees to work customary overtime. The overtime feature of the employment contract is described by the court as follows:

> "Thus if the wrappers are to have any work to do there must be some overtime work by the production employees. The Company's policy of many years standing has been to require such overtime work by production employees during the busy season, and such requirement is a part of each employee's contract of hire."

The Union was informed that it would be necessary to lay off 30 wrappers unless overtime work was resumed.

Following the refusal of the employees to perform overtime work in accordance with their contract, the Company on December 2, because of the resulting lack of work, laid off 30 wrappers and a strike followed in protest. On December 7, when the Union sought to negotiate, the Company imposed conditions on its willingness to continue bargaining. Assuming, contrary to the Company's contentions herein, that the strike in violation of the employment contract was a protected activity, and assuming that there was an obligation to bargain at that time with a non-conforming union, it is conceded for the purpose

of this application that the conditions imposed by the Company were unwarranted under the law.

If by reason of this conditional refusal the Company was properly found to have violated Section 8(a)(5) on December 7, 1949, then it follows that the strike which began as an economic strike in violation of the hiring contract was, after December 7, 1949 turned into an unfair labor practice strike, with the ensuing consequences pointed out in the report and decisions.

The critical importance of this point is emphasized by Judge Medina writing for the Court of Appeals below where he says:

> "This case, * * * turns on one fundamental issue: Whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by its refusal to bargain with the Union on December 7, 1949. * * *
>
> If on the other hand, the Board did not properly find that the Company's refusal to bargain on December 7, 1949 was unlawful, then the bargaining order should be set aside, and the case should be remanded to the Board to determine which of the strikers (who under this hypothesis were economic strikers) had been permanently replaced before they applied for reinstatement."

In considering this point it should be remembered that both the Trial Examiner and the Board found the Company innocent of all of the alleged unfair labor practises of December 1949 with which it was charged, (except the charge of improper interrogation which was dismissed by the Court of Appeals), and that there was later substituted in the proceedings a finding of guilt for the uncharged and unalleged offense of refusal to bargain in December 1949.

The chronology of events, so far as material to the present contentions, is as follows:

1. In December 1949 charges were filed by individual employees alleging violations of Sections 8(a)(1) and 8(a)(3) in making certain discharges and refusing reinstatement.
2. On April 5, 1950 the Union came into compliance.
3. On July 14, 1950 certain individuals filed amended additional charges alleging improper discharges on December 2, 1949, refusal to reemploy listed employees on December 7, 1949, refusal to reinstate employees on April 6, 1950, including the catch-all statement that by said acts and by other acts and conduct the Company has coerced its employees in respect to rights guaranteed in Section 7 of the Act.
4. On September 28, 1950, nearly six months after the Union had come into compliance, the Union filed charges under Sections 8(a)(1) and (5) based exclusively on the allegation that "the above named employer did on or about April 6, 1950 and thereafter refuse to bargain with the charging union * * *." There was no charge that the Company had refused to bargain in December 1949.
5. On May 1, 1951, all cases being consolidated, a complaint was issued alleging that the Company refused to bargain on or about April 11, 1950 in response to Union's request to bargain on April 6, 1950; that lay-offs on December 2, 1949 were in violation of Section 8(a)(3); that refusal to reinstate on December 7, 1949 was in violation of Section 8(a)(3); that refusal to reinstate certain named employees on April 11, 1950 was in violation of Section 8(a)(3); that certain interrogations, warnings, threats, and refusal to bargain since November 16, 1949 were all in violation of Section 8(a)(1).

In spite of the complaint's definiteness as to the events of December, it is nowhere indicated that said detailed acts are of a nature which could constitute a violation of Section 8(a)(5) or that they were claimed to be a violation of Section 8(a)(5). Submerged in Paragraph 21, largely devoted to other matters, is a final sentence that "Since November 16, 1949 has refused the Union's request to bargain * * *" but not related in any way to the conduct already detailed. The persons filing the charges, and the persons framing the complaint, either lacked any intention to present a claim of refusal to bargain in December or were engaged in a studied effort to disguise the claim. The stone which the builders rejected now has become the corner-stone.

The Examiners Report, rejecting all other allegations of the complaint, found:

1. That the Company had violated Section 8(a)(1) by interrogation of employees in December 1949.

2. That the Company had refused to bargain on and after December 7, 1949 (apparently this was treated as a violation of Section 8(a)(1) only) and that the Company had refused to bargain on and after April 11, 1950 in violation of Section 8(a)(5).

The *Board* in its decision said:

1. "We agree with the Trial Examiner that the Respondent's refusal to meet with the Union on and after December 7, 1949 violated Section *8(a)(1) of the Act as alleged in the complaint.*"

2. "We further find that Respondent's conduct on December 7, 1949, as well as its refusal to recognize the Union on and after April 11, 1950, also constituted a refusal to bargain in violation of Section 8(a)(5) of the Act."

3. "That the strike in December was converted to an unfair labor practice strike on December 7, 1949 when the Company unlawfully refused to meet with the Union."

4. "That the refusal of the Company to reinstate employees in April 1950 was unlawful."

5. "That the interrogation of employees in November 1949 constituted a violation of Section 8(a)(1)."

The Court of Appeals modified the Board's order by exonerating the Company in respect to improper interrogations, but otherwise sustained the Board.

POINT I

The Company was under no obligation to bargain with the charging Union in December, 1949.

The Court of Appeals ruled that the Company violated Section 8(a)(5) by refusing to bargain in December 1949, notwithstanding the fact that the Union, which was accused of being involved with Communism, did not come into compliance until the following April.

At the time of the alleged refusal to bargain in December 1949, the prevailing law, as laid down by the Board, relieved the Company from any obligation to bargain with a non-conforming union and did not require the Company to state this ground as a reason for its refusal.

Matter of Marshall & Bruce Company, 75 N.L.R.B. 90 (October 1947);
Matter of Andrews, 87 N.L.R.B. 379 (December 1949).

Both parties at that time were represented by experienced counsel, presumably well acquainted with these decisions. At that time there was considerable public opin-

ion among private citizens and public officials that an employer, who was free to do so, as a matter of public duty should refuse to encourage a Communist Union. The spirit as well as the letter of the law, they believed, invited employers to resist what was so generally regarded as a menace to society.

Notwithstanding Board decisions upon which the Company should be presumed to have relied, the decision of the Court of Appeals subjects the Company to the penalty of paying large sums of money as back pay on the ground that the strike in December was, by a refusal to bargain, transformed from an economic strike into an unfair labor practice strike. This, we submit, savors of the objections to *ex post facto* laws. (See *Arizona Grocery* v. *Atchison Ry.*, 284 U. S. 370.)

In rejecting arguments on behalf of the Company, the Court of Appeals said:

> "The refusal was based on grounds which were insufficient in the eyes of the law and was not premised upon the union's failure to comply with the requirements of that section."

The Company contends that the ruling is erroneous not only because of the obvious injustice entailed but also because it discourages voluntary conformance to existing Board rulings, which in turn promotes stabilization of labor relations. To hold that the Company waived such right because, in the course of bargaining, instead of asserting a flat refusal to bargain for legal reasons, it imposed conditions on bargaining, is to indulge in an unwarranted assumption. There is nothing to show that the Company would have imposed unwarranted conditions had it not been advised by counsel of its legal right to refuse either conditionally or unconditionally. In the *Andrews* case, *supra*, it had already been held that there was no obligation to bargain and that the employer could take advantage

of that fact even though it did not place its refusal on that ground.

Lastly, we do not construe the decision of this court in *Labor Board* v. *Dant*, 344 U. S. 375 (1935), as passing upon the question as to whether an employer may be found guilty of violating Section 8(a)(5) by refusing to bargain with a non-complying union. That case dealt only with violation of Sections 8(a)(1) and (3). As a matter of fact, it is still the practice of the Board to reject charges filed by individuals under Section 8(a)(5) where a non-complying union is involved, and no decision by any Court of Appeals has come to our attention which rejects or criticizes that practice, although there are decisions dismissing complaints by individuals under Section 8(a)(5) where the individual is found to be "fronting" for a non-complying union.

N.L.R.B. v. *Happ Bros.*, 196 F. 2d 195 (5th Cir. 1952);
N.L.R.B. v. *Alside, Inc.*, 192 F. 2d 678 (6th Cir. 1951);
Southern Furniture v. *N.L.R.B.*, 194 F. 2d 59 (5th Cir. 1953), cert. den. 343 U. S. 964.

Certain of the Courts of Appeal have construed the Supreme Court's decision in the *Dant* case to extend to cases involving alleged refusals to bargain under Section 8(a)(5) of the Act. *N.L.R.B.* v. *Reed and Prince Mfg. Co.*, 205 F. 2d 131 (1st Cir. 1953); *N.L.R.B.* v. *Tennessee Egg Co.*, 201 F. 2d 370 (6th Cir. 1953). It is submitted, however, that nothing in the Supreme Court's decision in the *Dant* case requires the construction thus urged. There is a recognizable and well-defined distinction between unfair labor practices which affect primarily, if not exclusively, the rights of employees as individuals (Sections 8(a)(1), 8(a)(3)and 8(a)(4)), and, on the other hand, unfair labor practices which affect primarily, if not exclusively, the status of a labor organization (Section 8(a)(5)).

The remedy for a violation of Section 8(a)(1) involving an alleged refusal to bargain would ordinarily appear to be an order to engage in bargaining. The same remedy, however, is appropriate for violations of Section 8(a)(5).

Here, however, as in other cases, the Board will not grant such a remedy under either section unless the labor organization involved is in compliance.

It is quite clear that a non-complying labor organization may not be certified as the exclusive bargaining agency for employees. *National Maritime Union* v. *Herzog,* 334 U. S. 854; *American Communications Association* v. *Douds,* 339 U. S. 382, 390 Fn. 6.

The Court below, in adverting to the case just cited, has said:

> "The privilege of becoming an 'exclusive bargaining' agent is altogether distinct from the common law right of workmen to combine; it is a creature of Congress to whose grant Congress was therefore free to attach such conditions as it saw fit. It has seen fit to deny the privilege to unions which will not disclose their affairs, as § 9(f) prescribes." *Fay* v. *Douds,* 172 F. 2d 720 at 724 (2nd Cir. 1949).

The same status should not be capable of being achieved indirectly. *Matter of Marshall and Bruce Company,* 75 N.L.R.B. 90, 95.

Board decisions are clear that an order to bargain collectively will, except under most unusual circumstances, bar the filing of a petition for decertification or a petition for certification (whether filed by an employee, the employer, or another labor organization), for at least the period of a year following the issuance of such order. The same rule obtains where a union is certified. Individual employees, however, if found to have been unlawfully discriminated against, may be entirely protected against

further actions of similar nature, and without doing violence to the concept that non-complying unions should not be certified. Reason would seem to require the application here of the same principle.

We submit that under the circumstances of this case, where at the time thereof the rulings of the Labor Board supported the right of the employer to refuse to bargain with a non-complying union, without stating that reason for such refusal, and where the Union and all charging individuals also apparently relied upon such decisions and filed no charge of a violation of Section 8(a)(5) in December 1949, it was erroneous for the Court of Appeals to find that the Company violated Section 8(a)(5) in December 1949.

POINT II

The various charges and the complaint covering a period of two years and four months did not allege a violation of Section 8(a)(5) in December 1949, or any facts suggesting such a violation at that time and by their specification of acts and dates clearly negatived any intention to prosecute such a claim.

We summarize the facts relevant to this procedural question. Except for the charges as to interrogations which were dismissed by the Court of Appeals, the only conduct of the Company in December 1949 which was challenged by timely charges was certain discharges and refusals to reinstate which were alleged to be violations of 8(a)(1) and (3). As to all of these charges the Company was exonerated. In this respect the picture is different from that confronting this court in *Radio Officers Union* v. *N.L.R.B.*, ... U. S. ...., 98 Sup. Ct. 251. In this case the only facts alleged in the timely charges in no way resembled a refusal to bargain and there was no claim of a violation of 8(a)(5). Moreover, no charges subsequently

filed, after the lapse of the six months limitation, referred to a refusal to bargain in December 1949, or presented any facts remotely resembling a refusal to bargain in December 1949, and when the complaint was finally issued in May 1951, its specification of acts and dates significantly omitted any facts suggesting that there was a refusal to bargain in December 1949.

The procedural requirements are clear. The Board has no power to initiate. It can only act on charges which must be based on acts which have not become stale by the lapse of six months and of which the Company has been given notice.

The general language of the Act confirms this. Section 8 lists three classes of acts, each of which is declared to be "an unfair labor practice." Section 10(b), relating to enforcement, states "whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * shall have the power to issue and cause to be served upon such person a complaint *stating the charges in that respect* * * * provided that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *."

To give the intended effect to these provisions the distinction between the different types of violations cannot be ignored (*N.L.R.B.* v. *Express Pub. Co.*, 312 U. S. 426).

In the case at bar three different interpretations of these provisions have arisen:

1. (a) The Company contends that a charge based on Sections 8(a)(1) and 8(a)(3) cannot without notice or amendment be made the basis of a complaint under Section 8(a)(5) where the specified acts do not remotely suggest a refusal to bargain. (b) A complaint alleging a violation of Section 8(a)(5) in April 1950 and violations of Sections

8(a)(1) and 8(a)(3) in December 1949 cannot without amendment become the basis of a proceeding for the violation of Section 8(a)(5) in December 1949.

2. The Board has ruled in *Cathey Lumber Co.*, 86 N.L.R.B. at pages 162-3 that the filing of any charge authorizes it to proceed on any and every unrelated charge, which means in effect that the Board, which cannot be self-starting may turn itself into a kind of F. B. I. without limitation. This case was later overruled, 189 F. 2d 428 (5th Cir.).

3. The court below (relying on its previous decision in *N.L.R.B.* v. *Dinion Coil Company*, 201 F. 2d 484, 491), ruled that the complaint need not be confined to the nature of the offense set forth in the charge provided that it confines itself to acts which are "closely interrelated" and which occurred within the six months period. Thus in the case at bar a charge that acts in December 1949 constituted a violation of Sections 8(a)(1) and 8(a)(3)—and which as detailed do not suggest a violation of Section 8(a)(5)—may by action of the Board be transmuted into a Section 8(a)(5) charge without the respondent receiving notice of such claim within the six months period—a notice which by the terms of the statute is mandatory.

As pointed out by the Court of Appeals for the Ninth Circuit in the case of *N.L.R.B.* v. *Martin*, 207 F. 2d 655 (October 19, 1953), there is also a conflict in the decisions of the different circuits in respect to the extent to which charges filed within the six months limitation may be expanded or amended by amended charges or by a complaint after the lapse of the six months period. In the *Martin* case, *supra*, at p. 657, the court points particularly to the conflicting decision of the Fourth Circuit in the case of *Joanna Cotton Mills Co.* v. *N.L.R.B.*, 176 F. 2d 749 which

supports the contention of the Company herein and which is in conflict with the decision of the Court of Appeals herein.

While for reasons stated in various cases, charges filed within the statutory period need not be too precise, nevertheless the function of charges as a *sine qua non*, calling for a substantial disclosure to the accused of what is charged, is not to be nullified for the following reasons:

1. To promote stable labor relations by barring stale claims, the statute requires that the charge be based on facts which took place within six months prior to the filing of the charge.

2. The party charged is to receive notice of the charges so he may act on the information so brought to his attention.

3. The Board's own regulations (Section 101.4) require that the party charged be given an opportunity to submit a statement as to its position.

   Under the rules—which are carried out by the forms in use—the charge must contain:

   "A clear and concise statement of the facts constituting the alleged unfair labor practices affecting commerce."

   "The case is then assigned to a member of the field staff for investigation who interviews representatives of all parties and those persons who have knowledge as to the charges."

4. The purpose of giving notice and of giving the accused an opportunity to make a statement, necessarily implies an intelligible charge to which the accused may direct his answer.

It is not enough to say *j'accuse* and it is still more indefensible by the specification of facts and dates not related to the important issue, to trap the unwary. At no time

did the Board amend the complaint in any particular (except as to spelling of names, etc.) although empowered by the Act to do so [Section 10(c)].

The Examiner's intermediate report issued August 20, 1951 found there was no unfair labor practice in respect to layoffs or refusal to reinstate employees in December 1949, nor in refusing to reinstate employees in April 1950, nor in refusal to bargain on and after April 11, 1950 in violation of Section 8(a)(5). He apparently did not believe that he had before him any issue as to a violation of Section 8(a)(5) in December 1949.

The Board on March 11, 1953, disregarding the foregoing limitations of the proceeding, added a completely new finding that the respondent had failed to bargain on December 7, 1949 in violation of Section 8(a)(5). This is the only finding that the Company is attacking in this application for a writ of certiorari.

It contends that since Congress saw fit to separate these specific types of conduct into separate paragraphs and to require notice of the charge as a condition precedent to the starting of the proceeding, with the further protection that such charges must be filed within six months after the acts complained of, these requirements cannot be ignored. Otherwise the Board—which has no power to initiate without an appropriate and timely charge with notice to the chargee—would be placed in a position whereby, contrary to the statute, and without notice to the company, it may act practically without limitation.

POINT III

Prosecution of the alleged refusal to bargain in December 1949 is barred for failure to file the required charge within six months of said alleged refusal.

Down to September 28, 1950 no charge was filed alleging facts in any way involving a refusal to bargain or alleging as a conclusion that there was a refusal to bargain or a violation of Section 8(a)(5).

Even the charge filed by the Union on September 28, 1950 limited itself to acts taking place in April 1950 and thereby excluded, any claim of refusal to bargain in December 1949.

In December 1949, a series of charges against the Company were filed by individual employees (not the Union) alleging violations of Sections 8(a)(1) and (3) of the Act by refusal to rehire the charging parties about November 25, 1949, by discharge of 27 employees on December 2, 1949, and by refusal of employment to 40 employees on December 7, 1949. On July 14, 1950, additional charges were filed again by individuals (not the Union) repeating some of the older charges and alleging a refusal of the Company to reinstate employees on or about April 6, 1950.

On April 5, 1950 the Union came into compliance, and on April 6 its attorneys gave the Petitioner notice of that fact and demanded a collective bargaining conference and unconditional reinstatement of employees.

It was not until September 28, 1950—nearly six months after compliance—that the Union filed charges under Sections 8(a)(1) and (5) alleging:

> "The above named employer did on or about April 6, 1950 and thereafter refuse to bargain with the charging union although said union did at that time and thereafter represent a majority of the employees of the employer within an appropriate unit."

The purpose of this charge apparently was to get under the wire in respect to the conduct of the Company on April 6, 1950, for if the Union had waited eight days longer the statute of limitations would have run against that conduct. There was no claim of a refusal to bargain in December 1949.

No charge was filed prior to September 28, 1950 alleging a refusal to bargain under Section 8(a)(5). No charge was filed at any time alleging a violation of Section 8(a)(5) in 1949.

The charge filed on September 28, 1950 related specifically to the Company's refusal to comply with the Union's written demand on April 6, the day after the Union came into compliance. The Union's written demand of April 6 and the Company's reply—to which the Union's charge of September 28 relates—were separate and independent acts in no way related to what happened months before in December 1949. The concrete and specific nature of the conduct of April 6 and the specific confinement of the Union charge to this conduct of April 6 clearly exclude any suggestion as to what happened during the previous December.

It seems clear to us under the circumstances that so much of this proceeding as relates to the charge of refusal to bargain in December 1949 is without any validity because it is contrary to the statute of limitations set forth in Section 10(b) of the Act, forbidding any complaint to be issued on any matter where the charge was not filed within six months after the act complained of.

In this case the prosecuting agencies with no authority to initiate have rescued discarded material from the refuse pile.

CONCLUSION

For the reasons hereinabove set forth, your Petitioner respectfully submits that the Writ of Certiorari be granted as prayed for in its Petition.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 624

PECHEUR LOZENGE CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R.A. 29-48)[1] is reported at 209 F. 2d 393. The findings of fact, conclusions of law, and order of the National Labor

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[1] "R.A." refers to the portions of the record printed as an appendix to the brief filed by petitioner (respondent below) in the court below. "B.A." refers to the portions of the record printed as an appendix to the brief of the Board in the court below. The proceedings in the court below are reprinted at R.A. 29-53. Where in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

Relations Board (B.A. 34-97) are reported at 98 ~~*infra*, pp. 13-16.~~ N. L. R. B. 496.

JURISDICTION

The decree of the Court of Appeals (R.A. 49-51) was entered on January 21, 1954. The petition for a writ of certiorari was filed on March 6, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and under Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether it is an unfair labor practice for an employer to refuse to bargain with a union representing a majority of his employees if the union has not then filed the affidavits prescribed in Section 9(h) of the Act as a prerequisite to resort to the processes of the Board.

2. Whether upon a charge alleging that petitioner unlawfully refused to reinstate certain strikers, the Board could include in its complaint an allegation that petitioner unlawfully refused to bargain with the union, where the refusal to bargain was part of a single series of closely related events which included the refusal to reinstate, and where the primary evidence of the refusal to bargain was contained in the same letter which set forth the refusal to reinstate.[2]

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[2] Petitioner's question 2 (Pet. 2) is not presented on this record for, contrary to the implication of this asserted question, the complaint in this case fully discloses "an intention to prosecute" an alleged refusal to bargain. See paragraphs 21, 26 and 28 of the Complaint, B.A. 21-23; see also the opinion of the court below at R.A. 42-43. The alleged deficiency of the charge is subsumed in the second question stated above.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra,* pp. 13-16.

STATEMENT

I. The Board's Findings of Fact [3]

In the fall of 1949 a large majority of petitioner's employees designated '65' The Wholesale, Retail and Warehouse Workers Union of New York and New Jersey, hereinafter called the Union, as their bargaining representative (B.A. 57; 123, 195). Although the Union had not at that time filed the non-Communist affidavits which were a prerequisite to its invoking the processes of the Board, the Company and the Union executed an agreement in which the Company recognized the Union as the sole collective bargaining agent of all the employees, and bargaining negotiations commenced (B.A. 58-64; 127-141, 153-156, 197-200, 229-233, 255-258, 261-265).

At this time, as the result of the refusal of certain production employees to work overtime, petitioner laid off 30 other employees. Immediately thereafter, substantially all of the remaining 70 employees went out on strike to protest the layoff (B.A. 71-72; 146, 168-170, 182-184, 191, 241-242, 244).

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[3] Petitioner has accepted the facts as stated in detail in the opinion of the court below (Pet. 4; see R.A. 29-39). In the interest of brevity we repeat here only the most crucial operative facts.

When the Union sought to confer with petitioner regarding a settlement of the strike, petitioner replied on December 7, 1949, stating that it would not meet with the Union for the next two months, and then only if the Union promptly called off the strike (B.A. 72-75; 287-288, 304-305, 308-309). In the same communication, petitioner stated that it would "rehire employees as we need them during this period of truce * * * regardless of seniority in job" (B.A. 73-74; 305-308). The Union continued to seek a bargaining conference or an understanding with petitioner covering various matters in dispute, including the order in which petitioner would reemploy the strikers, but petitioner ignored the Union's efforts (B.A. 75-76; 308-310, 288).

The strike continued until April 6, 1950, when the Union, which was now in full compliance with the affidavit requirements of the Act, again requested that petitioner bargain with it, and also asked that the striking employees be reinstated (B.A. 37, 77-78; 311). Petitioner refused to recognize the Union and declined to reinstate a number of the strikers (B.A. 78-81; 220-224, 248-250, 292-297).

The Board's jurisdiction was originally invoked in this matter by unfair labor practice charges filed by individual employees in December 1949, alleging that petitioner had violated Section 8(a)(1) and (3) of the Act, and specifying, *inter alia,* that on December 7, 1949, petitioner had unlawfully refused to re-employ some 40 employees (B.A. 4-10). Subsequent charges alleging that in April 1950 petitioner unlawfully refused to bargain and to

reinstate strikers were filed both by the Union and by various individuals (B.A. 11-16).

II. The Board's Conclusions and Order

On the foregoing facts the Board found that petitioner had unlawfully refused to bargain with the Union in December 1949 and that this unfair labor practice, by prolonging the strike, converted it from an "economic" strike to an "unfair labor practice" strike (B.A. 35-36, 89-90, 92). Consequently, the Board held that the strikers became "unfair labor practice strikers," entitled to reinstatement upon their application in April 1950 (B.A. 37-38). The Board ordered petitioner to cease and desist from its unfair labor practices, to bargain with the Union, and to reinstate the strikers with back pay for the period following April 6, 1950 (B.A. 42-47).[4]

III. The Decision of the Court Below

The court below, except for an immaterial modification, sustained the findings and order of the Board. The court held that petitioner's refusal to bargain with the Union in December 1949 was not excused by the Union's then non-compliance with the filing requirements of the Act, for "while failure to file * * * bars a union from access to the processes of the Board, it does not necessarily

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[4] Other portions of the order, not material here, directed petitioner to desist from interrogating its employees as to their union activity, and abated back pay for the period between the date of the trial examiner's report and the Board's decision (B.A. 40, 42).

destroy the Union's status as bargaining representative" (R.A. 43-44). Furthermore, the court held, the charge filed in December 1949 alleging the refusal to reemploy certain employees on December 7 supported the inclusion in the complaint of an allegation that petitioner refused to bargain, for the refusal to bargain and the refusal to reinstate were "closely interrelated" (R.A. 42); in fact, the refusal to bargain is "primarily evidenced" by the letter of December 7 which also sets forth the refusal to reemploy (R.A. 41). The court further agreed with the Board that the refusal to bargain converted the strike into an unfair labor practice strike, so that petitioner was under a legal obligation in April 1950 to reinstate the strikers and to bargain with the Union (R.A. 46-47).

ARGUMENT

1. The substantive holding of the court below—that in the circumstances of this case petitioner violated Section 8(a)(5) by refusing to bargain with the union which represented a majority of the employees, notwithstanding that the union had not then filed the affidavits which were a precondition to its invoking the processes of the Board—presents no question warranting review. Indeed, this Court has already denied certiorari on this question in *West Texas Utilities Co.* v. *National Labor Relations Board,* 341 U.S. 939, 342 U.S. 843, denying review of 184 F. 2d 233 (C.A. D.C.).[5]

[5] In the *West Texas* case the court of appeals rested its decision on two grounds: (1) that the American Federation of

Until a union complies with the Act's affidavit requirements, it is, of course, denied access to the processes of the Board. But—at least where, as in this case, the employer does not rely on the union's noncompliance as a basis for refusing to bargain—the fact that the union's affidavits are not on file at the time does not affect its status as majority representative or relieve the employer of the duty to bargain with it. Congress apparently so contemplated when it provided in Section 8(a)(5) that the employer's obligation to bargain ran to the representatives of his employees *subject to the provisions of Section 9(a)*, not to Section 9(h), and when it provided in Section 9(h) that the affidavit therein required could be executed contemporaneously with the Board's complaint, thereby presupposing that the statutory violation had occurred prior to the execution of the affidavit.[6] *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131 (C.A. 1), certiorari denied, 346 U.S. 887; *Na-*

Labor was not required to file the non-Communist affidavits, and (2) that in any event the union's failure to file did not relieve the employer of his statutory obligation to bargain. 184 F. 2d at 235-238, 239. In *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U.S. 322, 324, decided May 14, 1951, this Court expressly disapproved the *West Texas* case insofar as it rested on the first ground. Two weeks later this Court denied certiorari in the *West Texas* case.

[6] The fact that the Board could not certify the Union as the bargaining representative (Pet. 12) does not excuse the violation of Section 8(a)(5). An employer's duty to bargain with the representative of the majority does not depend on the Board's certification; a contrary contention was dismissed as "frivolous" in *National Labor Relations Board* v. *Dahlstrom Metallic Door Co.*, 112 F. 2d 756, 757 (C.A. 2), long before the Taft-Hartley Act was passed.

tional Labor Relations Board v. *Tennessee Egg Co.*, 201 F. 2d 370 (C.A. 6); *National Labor Relations Board* v. *Lambert*, 33 LRRM 2580 (C.A. 5), decided February 23, 1954, enforcing 98 NLRB 848, 862. See also *National Labor Relations Board* v. *Dant & Russsell*, 344 U.S. 375.

There is no merit to petitioner's suggestion (Pet. 9-11) that it was entitled to rely on earlier Board decisions holding, contrary to the cases cited above, that an employer was in all circumstances immunized against a charge of unlawful refusal to bargain under Section 8(a)(5) if the union was not in compliance with Section 9(f), (g) and (h) at the time of the refusal to bargain. The Board first announced this rule in *Andrews Co.*, 87 NLRB 379, decided December 6, 1949, the day before petitioner's refusal to bargain. Petitioner, when it refused to bargain with the union, did not rely either on that decision or on the Union's noncompliance.[7] On the contrary, petitioner's president repeatedly made it clear that she was unconcerned with the Union's noncompliance (B.A. 279, 125-126, 153, 197); and the letter evidencing the refusal to bargain conditions further bargaining only upon abandonment of the strike, not upon filing the affi-

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[7] There is nothing to indicate that petitioner was aware of this decision when it wrote its letter of December 7. The *Andrews* decision was disapproved in the *West Texas* case, *supra*, 184 F. 2d at 239 (July 10, 1950), and was overruled by the Board in *New Jersey Carpet Mills*, 92 NLRB 604, 606-613 (December 11, 1950).

davits (B.A. 305-308, 309).[8] In these circumstances, petitioner's assertion that the Board's order, enforced by the court below, represents an abuse of discretion and "savors of the objections to *ex post facto* laws" is insubstantial. Cf. *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F. 2d 141, 144-148, 149 (C.A. 9).

2. The procedural holding of the court below—that the Board's complaint properly alleged an unlawful refusal to bargain in December 1949 because that violation was "closely related to" the violations alleged in the charge—likewise accords with settled law; indeed, petitioner's challenge thereto rests primarily on the theory that the violations were not "closely related," and hence raises only an issue of fact which warrants no further review.

Under the Wagner Act the law was well settled that a charge invoking the jurisdiction of the Board need not particularize all the acts and conduct later alleged in the complaint as violations; the charge was merely designed to set "in motion the machin-

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[8] Petitioner now concedes (Pet. 5-6) that the conditions it imposed "were unwarranted under the law." We do not understand petitioner's intimation (Pet. 5) that the strike was not a protected activity, for the purpose of the strike was to compel the reinstatement of 30 laid-off workers (B.A. 146, 170, 183). While the layoff was itself a legal act, and while the refusal of some employees to work overtime, which necessitated the layoff, may have been a breach of their contract of hire, the strike, even if unwise or unjustified, was for the legitimate purpose of compelling the reinstatement of the laid-off employees. Cf. *National Labor Relations Board* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333, 344; *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 750 (C.A. 9).

ery of an inquiry," *National Labor Relations Board* v. *Indiana & Michigan Electric Company,* 318 U.S. 9, 18, and to permit the Board to "enter intelligently upon the exercise of its exploratory powers," *Consumers Power Co.* v. *National Labor Relations Board,* 113 F. 2d 38, 42 (C.A. 6). The Taft-Hartley Act, although protecting employers and unions from liability for violations committed over six months prior to the filing of the charge, did not impose any further requirement of specificity upon the charge.[9] Consequently, this Court and the courts of appeals have uniformly interpreted the latter Act as authorizing the Board to include in its complaint violations related to those alleged in the charge although not specifically alleged therein. *Radio Officers' Union* v. *National Labor Relations Board,* 347 U.S. 17, 34, n. 30, affirming *National Labor Relations Board* v. *Gaynor News Co.,* 197 F. 2d 719, 721-722 (C.A. 2), and citing with approval, *National Labor Relations Board* v. *Kobritz,* 193 F. 2d 8, 14 (C.A. 1); *National Labor Relations Board* v. *Bradley Washfountain Co.,* 192 F. 2d 144, 149 (C.A. 7); and *National Labor Relations Board* v. *Kingston Cake Co.,* 191 F. 2d 563, 567 (C.A. 3). *Accord: National Labor Relations Board* v. *Martin,* 207 F. 2d 655, 657 (C.A. 9), certiorari denied,

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[9] The phrase "stating the charges in that respect," emphasized by petitioner (Pet. 14), appeared in the original Act, but was never construed as limiting the complaint to the precise violations alleged in the charge. See cases cited above, and cf. *Consolidated Edison Co. National Labor Relations Board,* 305 U.S. 197, 225, cited in *Radio Officers' Union* v. *National Labor Relations Board,* 347 U.S. 17, 34, n. 30.

No. 511, this Term; *Cusano* v. *National Labor Relations Board,* 190 F. 2d 898, 903-904 (C.A. 3); *National Labor Relations Board* v. *Westex Boot & Shoe Co.,* 190 F. 2d 12, 13-14, 190 F. 2d 556 (C.A. 5); *Kansas Milling Co.* v. *National Labor Relations Board,* 185 F. 2d 413, 415 (C.A. 10). See also *National Labor Relations Board* v. *United States Gypsum Co.,* 206 F. 2d 410, 412 (C.A. 5), certiorari denied, 347 U.S. 912; *National Labor Relations Board* v. *Epstein,* 203 F. 2d 482, 485 (C.A. 3), certiorari denied, 347 U.S. 912.[10]

Here, as the court below properly observed, "the entire series of events, including the earlier refusal to work overtime, the resulting layoffs, the strike, the request for reinstatement and the refusal to bargain are all closely interrelated" (R.A. 41-42). Indeed, as the court noted, the precise date specified in the charge, December 7, is the date of petitioner's letter which not only sets forth the refusal to rehire but is also the primary evidence of the refusal to

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[10] The sole decision looking to the contrary is *Joanna Cotton Mills* v. *National Labor Relations Board,* 176 F. 2d 749, 754 (C.A. 4), on which petitioner relies, citing the *Martin* case, *supra* (Pet 3, 15.) Since the filing of the petition, however, this Court has denied certiorari in *Martin.* As pointed out in our opposition to certiorari in *Martin,* the *Joanna* case is not squarely in conflict, is distinguishable on its facts, and has not generally been followed. See pp. 10-11, Brief in Opposition, No. 511, this Term.

National Labor Relations Board v. *I.B.S. Mfg. Co.,* 33 LRRM 2583 (C.A. 5), is not in conflict with the decision of the court below. In that case the Fifth Circuit held that a charge alleging discriminatory discharges in March and April 1949 would not support a complaint alleging a refusal to bargain in January 1949, where *as a matter of fact* the two violations were *entirely unrelated.*

bargain (R.A. 41). The court's finding of close relationship is manifestly correct and presents no question requiring further review.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL 1954.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V, 151 *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the

overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

SEC. 10 (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *. Any such complaint may be amended by * * * the Board in its discretion at any time prior to the issuance of an order based thereon. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein

such person resides or transacts business for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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